In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1932

WILLIAM GRONER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a wholesale distributor of paperback books and magazines, was convicted of transporting obscene matter (copies of four books containing sexually explicit descriptions and photographic inserts) interstate, in violation of 18 U.S.C. 1462. He was sentenced to five years' imprisonment and fined $5000. A panel of the court of appeals reversed the conviction (475 F. 2d 550), but on rehearing *en banc* the court overruled the panel and affirmed the conviction. 479 F. 2d 577. This Court vacated and remanded for further consideration in light of *Miller* v. *California*, 413 U.S. 15, and its companion cases. 414 U.S. 969. On remand the court of appeals once again affirmed the conviction (Pet. App. A).

Petitioner's principal legal contentions were disposed of by this Court in *Hamling* v. *United States*, No. 73-507,

decided June 24, 1973.[1] He contends (1) that 18 U.S.C. 1462 was unconstituionally vague at the time his offense was committed; (2) that his indictment also was impermissibly vague; (3) that the government failed to establish *scienter*; (4) that the evidence of community standards was insufficient; (5) that the materials in question were not obscene under the *Roth-Memoirs* standards; and (6) that the court of appeals on remand erred in testing his conviction under the *Miller* standards.

1. Petitioner contends (Pet. 14-18) that 18 U.S.C. 1462 was unconstitutionally vague prior to this Court's decision in *Miller*. That contention was rejected as to the companion provision, 18 U.S.C. 1461, by this Court in *Hamling* v. *United States, supra*, slip op. at 20-27. The considerations stated by the Court there require rejection of petitioner's vagueness claim as well.[2]

2. Petitioner contends (Pet. 18-22) that, because of the inherent ambiguity in the statutory expression "obscene, lewd, lascivious and filthy," the identically phrased indictment was impermissibly vague. This contention also was rejected in *Hamling, supra*, slip op. at 27-29, for reasons we rely upon here.

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[1]The decision in *Hamling* also resolved the conflict among the courts of appeals that petitioner describes (Pet. 13-14).

[2]Petitioner complains that the use of "national community standards" imported an element of vagueness and uncertainty into his trial, but he does not suggest that "the excision of the references to the 'country as a whole' in the instruction dealing with community standards would have materially affected the deliberations of the jury." *Hamling, supra*, slip op. at 18.

3. The government at trial showed that petitioner had knowledge of the nature of the contents of the materials at the time he caused them to be transported interstate. Petitioner claims (Pet. 22-30) that the government should have been further required to establish that he knew the materials were legally obscene. Neither the statute nor the Constitution requires such an additional showing. *Hamling, supra*, slip op. at 29-34; *Rosen* v. *United States*, 161 U.S. 29.

4. Petitioner contends (Pet. 30-33) that the proof at trial of national community standards was insufficient. But affirmative evidence of national community standards was unnecessary since the materials themselves had been introduced into evidence. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56; *Kaplan* v. *California*, 413 U.S. 115, 121.

5. Petitioner argues (Pet. 33) that the materials he caused to be transported were not in fact obscene under the *Roth-Memoirs* standards. That essentially factual decision was decided against petitioner by the jury and the courts below and it merits no further review.

6. Finally, petitioner contends (Pet. 34-35) that the court of appeals on remand erred in testing his conviction under the *Miller* standards. But the court in fact reviewed petitioner's conviction under both the *Miller* and the *Roth-Memoirs* standards. The court proceeded on the theory that "[u]nless the material is judged to be obscene under both the old and the new standards, there can be no conviction" (Pet. App. A, p. A4) and concluded that "under each of the two tests the books are indeed obscene" (Pet. App. A, p. A5). Petitioner's suggestion that his conviction was affirmed on a different legal standard than the one under which he was tried is therefore without factual basis.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10